June 28, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Katherine Tai
United States Trade Representative
Office of the U.S. Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Comments of National Association of Waterfront Employers to Proposed Modifications to the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation – Docket No. USTR-2024-0007

Dear Ambassador Tai:

On behalf of the National Association of Waterfront Employers ("NAWE"), we hereby submit comments in response to the *Request for Comments on Proposed Modifications and Machinery Exclusion Process in Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 89 Fed. Reg. 46252 (May 28, 2024), published by the Office of the U.S. Trade Representative ("USTR").

The proposed twenty percent (25%) tariff on the importation of ship-to-shore gantry cranes ("STS cranes"), to be classified under HTSUS subheading 8426.19.00, would cause disproportionate harm to U.S. economic and national security interests and would not be effective in eliminating China's acts, policies and practices, as intended by the Section 301 investigation. In addition, tariffs are not an appropriate tool for addressing perceived cybersecurity risks, which are better addressed by ongoing federal rulemaking efforts. Accordingly, NAWE requests that USTR remove STS cranes as proposed under HTSUS subheading 8426.19.00 from the final list of commodities subject to increased tariffs or, in the alternative, that implementation of the tariff be delayed by at least two (2) years. The basis for this request follows.

I. Statement of Interest

NAWE is a non-profit trade association whose member companies are privately-owned stevedores, marine terminal operators ("MTOs"), and other U.S. waterfront employers. NAWE's member companies engage in business at major U.S. ports on the Atlantic and Pacific coasts, the Gulf of Mexico, the Great Lakes, and Puerto Rico. Accordingly, NAWE's members operate the critical connection between global commerce and our Nation's economy and are committed to keeping America's international trade and commerce flowing, while maintaining an unwavering dedication to workplace safety for our waterfront workers. In that capacity, NAWE's members are responsible for the purchase, maintenance, and operation of billions of dollars of cargo handling equipment, including STS cranes, to maintain the flow of American commerce. In addition, NAWE's members are responsible for implementing and monitoring cybersecurity measures in the operation of their marine terminals and cargo handling equipment, including STS cranes. It is a role that NAWE's members take seriously, and they have made tremendous financial investments to ensure the security of their networks and equipment to prevent cyber attacks and protect U.S. ports as critical national security assets. As such, NAWE's members would be directly impacted by the proposed tariff, which would (1) harm the competitiveness of U.S. ports and MTOs against Canadian and Mexican port competitors, (2) increase the costs of consumer goods imported into the United States and undermine the competitiveness of U.S. exports in the international market, (3) create dangerous working conditions for U.S. union waterfront workers, (4) undermine far more effective tools implemented by NAWE's members to address cybersecurity risks in the marine terminal environment, and (5) significantly increase the costs of potentially billions of dollars of STS cranes purchased with private funding by NAWE's members.

II. Background

STS cranes are the most fundamental piece of infrastructure in the operation of marine terminals. They are, quite literally, the central connection point between maritime and surface modes of transportation. According to the U.S. Department of Transportation, Bureau of Transportation Statistics ("BTS"), over ninety percent (90%) of goods imported into the United States arrive by vessel, accounting for over $1.8 trillion in trade value in 2021, far eclipsing any other mode of transportation. The majority of these goods arrive via intermodal containers with U.S. marine terminals handling over 47.6 million twenty-foot equivalent containers ("TEUs") in 2021, according to BTS. Each of these containers was handled by an STS crane, ensuring the safe transition between modes of transportation.

STS cranes are custom designed according to individual terminal requirements, generally costing between $15 million to $20 million per crane, and taking roughly two-to-three years of lead time to build and deliver. Each STS crane is built to a specified height and equipped with a boom that can lift a container to or from the highest point on a vessel and can reach across the entire width of a ship to load and unload containers that are positioned on the pier. As such, as vessels grow in size, MTOs are required to order new STS cranes to meet their ocean carrier customers' needs. Indeed, as recently as 2015, the average container ship calling U.S. ports carried less than 6,000 twenty-foot equivalent containers ("TEUs"). However, with the widening of the Panama Canal and increases in fuel costs and higher trade volumes, vessel operators have been deploying ever larger ships to more efficiently move greater amounts of cargo. Over the past decade, ship capacity has quadrupled, and ships deployed in global trades today by liner networks are capable of carrying more than 24,000 TEUs. Accordingly, to ensure that U.S. MTOs can continue to meet the Nation's trading needs, it is imperative to have flexibility to competitively purchase STS cranes.

The application of a twenty-five percent (25%) tariff to STS cranes would make it prohibitively expensive for NAWE members to upgrade and/or replace mission critical equipment. If this equipment is not installed, the ports will be limited as to the types of vessels and volumes of cargo they can handle and will be less attractive ports of call for more modern, large capacity vessels, which will instead call ports in Canada and Mexico. The net result will be the loss of U.S. union waterfront jobs, which will be transferred to Canadian and Mexican waterfront labor. Moreover, given the two-to-three year timeline for the construction and delivery of STS cranes, NAWE's members already have billions of dollars of STS cranes on order, which would be impacted by the proposed tariff, immediately increasing the costs of such cranes and leading to increased costs in the maritime supply chain. The direct result will be an increase in the cost of consumer goods in the U.S. and a reduction in the competitiveness of U.S. exports in the international market, as discussed below. The follow-on effects would therefore harm U.S. manufacturers, retailers, exporters, and consumers, resulting in job loss across numerous U.S. industries and exacerbate the American public's inflation concerns.

III. Increased Tariffs on STS Cranes Would Negatively Impact the U.S. Economy, Including U.S. Consumers

STS cranes at U.S. ports handle containerized cargo arriving from or destined for nearly every country in the world, literally connecting the U.S. economy to the international market. While the proposed tariffs would have little, if any, impact on China's trade policies or practices, they could significantly disadvantage U.S. exports and imports.

(a) The Proposed Tariff Would Harm U.S. Manufacturers, Retailers, Consumers, and Exporters, and Negatively Impact National Security

First, the imposition of a twenty-five percent (25%) tariff on STS cranes will make it significantly less likely that NAWE's members will be able to timely upgrade or replace aging container lift equipment. The direct result will be reduced capability for U.S. ports to work ultra large container vessels or handle increased container volumes resulting from the use of these vessels and from increased trade generally. This will negatively impact U.S. manufacturers that rely on "just-in-time" logistics for raw materials and components, harm U.S. retailers that import many of their goods, and increase costs for small, medium, and large U.S. exporters that rely on ocean transportation to get their goods to international markets.

The inability of U.S. MTOs to competitively purchase new STS cranes could also impact their ability to load and unload containerized U.S. military cargo in times of national emergency. Marine terminals at U.S. ports are essential to facilitate the movement of mission critical Department of Defense supplies, equipment and personnel necessary to support U.S. military operations. When responding to a national emergency, the U.S. Transportation Command typically moves over ninety percent (90%) of its cargo by sea. Thus, the implications of the proposed tariffs for national security extend beyond economic considerations to also reach national defense initiatives.

Moreover, if U.S. MTOs are forced to incur the increased costs of STS cranes from the proposed tariff, it is likely that those costs will be passed along to ocean carrier customers through increased cargo handling fees. In turn, ocean carriers will pass along those increased fees to their shippers customers. The net result from such increased transportation costs will be <u>(a) an increase in costs of U.S. exports, undermining the competitiveness of such exports in international trade, and (b) an increase in the costs of consumer goods imported into the United States</u>. Ultimately, therefore, while the proposed tariff would not have an economic impact on China, nor would it result in a change in cybersecurity risks at U.S. ports (as discussed below), it would result in increased costs to U.S. consumers, manufacturers, and retailers and a reduction in the competitiveness of U.S. exports.

In addition, the proposed tariff would harm manufacturers in our allied nations. As discussed below, Chinese STS crane manufacturing generally only incorporates Chinese steel, with the remainder of the electrical components, drive systems, and software derived from allied nation manufacturers. Therefore, levying a tariff on the entire crane imported from China indirectly places an undue burden on the allied nation producers of these electrical components.

(b) The Proposed Tariff Would Negatively Impact U.S. Port Competitiveness and Result in U.S. Job Losses

In addition, U.S. ports are facing increased competition from Canada and Mexico. For example, in 2003 the Ports of Los Angeles and Long Beach processed more than half (56%) of all Asian imports to the United States.[1] By 2018, the Ports of Los Angeles and Long Beach moved only 46% of all Asian imports to the United States.[2] Projecting forward, based on current cargo trends it is estimated that the Los Angeles/Long Beach share of U.S. import discretionary cargoes from Asia "will have fallen from 56% in 2003 to 42% by 2030."[3] As a result of trade being diverted from the U.S. West Coast to Mexico, the Ports of Mananzillo and Lázaro Cárdenas (which combined handle over 90% of Mexico's West Coast international trade) saw a throughput increase in containerized cargo of 15.3% in 2022, more than five times the increase experienced in any other Central American, South American, or Caribbean port region.[4]

Canadian ports are a present and growing threat for U.S. West Coast ports, with U.S.-origin and destination cargo representing 27.4% of BC ports' container volume, up significantly from 23.7% in 2015.[5] Indeed, the "[g]rowth at Prince Rupert has been driven primarily by [Canadian National Railway's] service to markets in the U.S. Midwest, which account for two-thirds of the port's container volume."[6] Prince Rupert "has been gaining market share over U.S. ports due to its closer sailing time to Asian ports as well as its low container dwell times."[7]

The Canadian competitive threat is equally present for U.S. East ports, as Canadian ports continue to increase capacity, without the threat of tariffs imposed on cargo handling equipment. For example, the Port of Montreal "plans over the next five years to invest from its own funding $335 million in its various facilities on the Island of Montreal and about $300 million in the Contrecoeur expansion project to increase container capacity by 1.15 million TEUs."[8] Similarly, the Port of Halifax recently "unloaded two new mega-ship cranes [purchased from Chinese manufacturers without the imposition of tariffs] for its Atlantic Hub terminal in the south end of the port. They will be added to the five existing post-Panamax cranes – thereby permitting the terminal to handle the largest container vessels deployed on the North American east coast. By the end of 2024, the new equipment will have expanded PSA Halifax capacity from 1.1 to 1.4 million TEUs."[9]

[1] Dr. Michael Nacht, et al., *Sustaining the San Pedro Bay Community Ports of Los Angeles and Long Beach* (April 10, 2019) at 7.

[2] *Id.* at 7-8 ("These US Asian imported cargo shipments are destined to the population centers east of the Mississippi River and have 'bypassed' the Ports of Los Angeles & Long Beach.").

[3] *Id.* at 11.

[4] United Nations, *Review of Maritime Transport 2022* at 51.

[5] Mercator International, *Analysis of BC Port Container Volume by Origin/Destination* (March 2019) at 3.

[6] Bill Stephens, *Prince Rupert Container Port Expansion to Boost Canadian National Intermodal Traffic*, Trains (June 20, 2018).

[7] *Id.*

[8] Leo Ryan, *Competition for Container Cargo Growing Between Canadian East Coast Ports*, American Journal of Transportation (Apr. 22, 2024).

[9] *Id.*

In addition to rapidly-increasing competition from Canadian ports, U.S. ports are facing increased competition for discretionary cargoes from Mexican ports (particularly for imports destined for Mexico). "Shippers are sending cargo through Mexican ports such as the Port of Ensenada that otherwise would have gone through the ports of Los Angeles or Long Beach, 200 miles to the north, and sent by truck into Mexico."[10] This shift is based upon an increase in the amount of shipping services available in Mexico, together with the difficulty of securing trucking services in the United States.[11] The result is that imports from Asia moving through Mexican ports jumped 12.9% between 2016 and 2017, with aggregate imports at Mexican ports such as the Port of Lázaro Cárdenas growing by as much as 8.7% during the same period.[12] Mexican ports saw a further 8.7% growth in aggregate cargo volumes in 2018 (compared to only a 4.8% growth at U.S. ports) representing the largest growth in North America.[13]

Increased cargo handling fees at U.S. ports caused by the proposed STS crane tariff will only exacerbate this competitive issue by making U.S. marine terminal services more expensive than their Canadian and Mexican competitors. The net impact of the proposed tariff, therefore, could be a further reduction in the utilization of U.S. ports, to the benefit of Canada and Mexico, <u>reducing the number of high-paying U.S. union longshore jobs, which in turn will be sent to Canadian and Mexican labor</u>.

IV. Increased Tariffs on STS Cranes Would Not Achieve the Objectives of USTR's Section 301 Investigation

(a) The Proposed Tariff Would Not Improve U.S. Port Cybersecurity and is not the Appropriate Tool to Address Cybersecurity Risks

In its recent report[14] that serves as the basis of the proposed tariff modifications, USTR provides only limited discussion of the proposed purpose of the STS crane tariff. In the report, USTR notes, "With respect to ship to shore cranes, increasing Section 301 duties may be appropriate to support the security interests of the United States from the threat of Chinese state-sponsored cyber intrusions of critical infrastructure." As a preliminary matter, NAWE questions the basis for the belief that Chinese STS cranes present a cybersecurity threat. In reality, while STS cranes may be manufactured in China, it is generally only the steel components that are sourced in China. Indeed, Chinese-manufactured STS cranes used at U.S. marine terminals incorporate operating software and drive systems developed in allied nations to mitigate cyber security risks. In addition, to further mitigate potential cybersecurity risk, the STS cranes are deployed at marine terminals through the use of appropriate network isolation measures, bolstered by the security of zero-trust policies. As such, the software that drives STS cranes is not derived from Chinese STS crane manufacturers, and has no connection to other port IT networks, so the basis of any cyber security concerns is unclear. Indeed, the U.S. Coast Guard ("USCG") has been engaged for over a year in a comprehensive

[10] Hugh R. Morley, *Mexican Importers Shift Cargo from U.S. West Coast to Home Ports*, Journal of Commerce (May 15, 2018).

[11] *Id.*

[12] *Id*.

[13] Hugh R. Morley, *North America Port Rankings: Mexican Ports Grow Fastest*, Journal of Commerce (May 6, 2019).

[14] *Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (May 14, 2024).

cybersecurity review to analyze the risk of Chinese-sourced STS cranes. To our knowledge, USCG has not yet identified a single cybersecurity incident derived from an STS crane.

More to the point, tariffs are not an appropriate mechanism to address cybersecurity concerns. Such concerns are more appropriately addressed through appropriate industry cybersecurity standards, overseen by regulatory agencies. Notably, this process is already well underway, with USCG issuing Maritime Security Directive 105-4, *Cyber Risk Management Actions for Ship-to-Shore Cranes Manufactured by People's Republic of China Companies*, on February 21, 2024. U.S. MTOs have been working closely with USCG Captains of the Port throughout the United States to ensure that USCG-approved cyber risk management policies are in place. In addition, on February 22, 2024, USCG issued a comprehensive proposed rulemaking on Cybersecurity in the Maritime Transportation System.[15] USCG is currently reviewing public comments as it proceeds towards a final rule. Similarly, the Cybersecurity and Infrastructure Security Agency ("CISA") issued a proposed rule on April 4, 2024, to implement the reporting requirements of the Cyber Incident Reporting for Critical Infrastructure Act ("CIRCIA").[16] CISA's rulemaking governs the reporting of any cyber incident at U.S. ports, including those that involve STS cranes. These regulatory actions are the appropriate manner to address cybersecurity concerns. Accordingly, NAWE urges USTR to allow this regulatory process to develop, which will directly address STS crane cybersecurity risks, before taking less impactful draconian measures in the form of tariffs.

(b) The Proposed Tariff Will Not Change the Procurement of Chinese STS Cranes

The simple fact is that there are limited manufacturers of STS cranes. Market competitors in the STS crane space include Doosan Corporation, Hyundai Samho Heavy Industries, Cargotec, Konecranes, Liebherr, PACECO, Terex Corporation, and Shanghai Zhenhua Heavy Industries ("ZPMC"). Although many of these manufacturers are based in allied nations, they actually engage in the manufacture of STS cranes in China. Accordingly, the proposed tariff would not just impact ZPMC, which appears to be main source of any perceived cybersecurity concern, but would have a significant impact on the cost of cranes procured from companies based in allied nations that will continue to manufacture STS cranes in China to meet international demand. Indeed, U.S. demand for STS cranes is relatively small when considered on a global scale, thus the proposed tariff is unlikely to dissuade such companies from continuing to manufacture of STS cranes in China.

In addition, the limited number of STS cranes that are manufactured outside of China are either of insufficient size or otherwise lack sufficient operational history to demonstrate that they meet the needs of U.S. MTOs. It is for this reason that Chinese-manufactured STS cranes account for more than eighty-percent (80%) of the STS cranes at U.S. ports. Accordingly, the proposed tariff on STS cranes would place U.S. MTOs in the unreasonable position of having to choose between: (1) purchasing STS cranes from China at a higher cost, leading to increased transportation costs across the U.S. economy (discussed above), (2) purchasing STS cranes that may not be suitable for the operating environment of U.S. MTOs, leading to a more dangerous working environment for U.S. union waterfront workers, or (3) deferring STS crane recapitalization, leading to aging equipment and restricting the ability of MTOs to service larger vessels in international trade, resulting in the further loss of union jobs to Mexico and Canada.

[15] 89 Fed. Reg. 13404 (Feb. 22, 2024).

[16] 89 Fed. Reg. 23644 (Apr. 4, 2024).

Given these untenable choices, U.S. MTOs will likely be forced to continue to purchase Chinese STS cranes, notwithstanding the imposition of the proposed tariff, to mitigate the risk of creating a more dangerous working environment for their union waterfront workforce or losing further market share and jobs to foreign port competitors. Accordingly, the tariff is unlikely to have any impact on the continued procurement of Chinese STS cranes.

(c) The Proposed Tariff Will Not Protect U.S. Intellectual Property

In its original Notice of Determination, USTR cited four areas in which it found China's acts, policies and practices to be unreasonable, discriminatory and burdensome on U.S. Commerce.[17] These included:

1. Chinese practices that required or pressured technology transfer from U.S. companies;
2. Chinese regulations that force U.S. companies to license their technologies on unfavorable terms;
3. Chinese practices that seek to unfairly obtain U.S. companies and assets to obtain their cutting-edge technologies and intellectual property; and
4. Chinese support for unauthorized intrusions and theft of intellectual property and sensitive commercial information from the computer networks of U.S. companies.

While NAWE strongly supports USTR's efforts to ensure fair and legal trade practices, the imposition of a twenty-percent (25%) tariff on Chinese-manufactured STS cranes will not address any of the foregoing areas. The simple fact is that there currently are no U.S. companies manufacturing STS cranes and, accordingly, there is no U.S. STS crane technology or intellectual property to safeguard. In addition, while NAWE remains keenly interested in the Administration's efforts to develop a U.S. market for STS crane manufacturing,[18] such domestic manufacturing is years (if not decades) away from being a reality. NAWE is ready to work with the Administration to further this effort, however, given the relatively limited market for STS cranes in the United States, and the huge economic and environmental barriers to market entry, there are substantial hurdles to be overcome before U.S. STS crane manufacturing commences and there is a need to protect U.S. STS crane intellectual property.

In addition, as described above, the operating software and drive systems employed on Chinese STS cranes at U.S. marine terminals are sourced from other allied nations. In addition, robust cyber security measures and firewalls are in place to ensure that STS systems do not connect to other port IT networks. Accordingly, there is no risk of U.S. intellectual property theft via STS cranes, which neither possess Chinese operating software nor have the opportunity to connect to other networks to engage in digital theft.

V. The Proposed STS Tariff Exceeds USTR's Authority under a Four-Year Review

In addition to the above substantive concerns, NAWE has a significant procedural concern with USTR's proposed STS crane tariff. Specifically, this proposed action is being

[17] *See Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation,* 83 Fed. Reg. 14906, (April 6, 2018).

[18] *See FACT SHEET: Biden-Harris Administration Announces Initiative to Bolster Cybersecurity of U.S. Ports* (Feb. 21, 2024).

taken as part of a statutorily-mandated four-year review in accordance with 19 U.S.C. § 2417. Under such authority, USTR "may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action."[19] As defined by 19 USC § 2481(6), "the term 'modification', as applied to any duty or other import restriction, includes the elimination of any duty or other import restriction." Accordingly, USTR's authority under the President's direction is limited to either terminating or "eliminating" any existing duty or other import restrictions. Nowhere in Section 301 of the Trade Act of 1974 does USTR appear to possess the authority to add tariffs to new classes of products during a four-year review. Indeed, to do so without the opportunity for an appropriate Section 301 hearing would be ill-advised, particularly when considering the severe negative economic implications discussed above. Accordingly, because the proposed STS crane tariff exceeds the statutory purpose of a four-year review, it should be eliminated from the final list of items subject to increased tariffs.

VI. Conclusion

The stated goals of the proposed Section 301 action are to address China's unreasonable and discriminatory policies and practices that burden or restrict U.S. commerce. Imposing a twenty-five percent (25%) tariff on the importation of Chinese STS cranes will not only be ineffective in advancing those goals, but will damage U.S. interests by impairing U.S export trades and increasing the costs of consumer goods. The inability of the maritime industry to purchase from China new STS cranes to upgrade and replace aging equipment that is not manufactured in the United States will harm U.S. port productivity and have disproportionately harmful effects throughout the U.S. supply chain. In addition, such tariff will not have any impact on cyber security risks at U.S. ports, which risks are better addressed by industry solutions and the ongoing USCG and CISA regulatory actions.

Accordingly, we hereby respectfully request that STS cranes under proposed HTSUS subheading 8426.19.00 be removed from consideration for increased tariffs. In the alternative, if USTR is unwilling to remove STS cranes from the proposed tariff in their entirety, we respectfully request that USTR consider a delayed implementation date of at least two years, allowing any STS cranes **ordered by U.S. MTOs prior to August 1, 2026**, be exempt from the tariff. This will allow MTOs with pressing recapitalization needs to place orders in a manner that would mitigate the myriad negative impacts discussed above.

Sincerely,

National Association of Waterfront Employers

APM Terminals
The Cooper Group of Companies
Fenix Marine Services, LLC
First Coast Terminals, LLC
Georgia Ports Authority
Husky Terminal
International Transportation Service, LLC
Long Beach Container Terminal, LLC
Luis A. Ayala Colon Sucrs., Inc
Maher Terminals LLC
Ports America Group, Inc.
Port Liberty Terminals
Port of Houston Authority
Port of New Orleans
Port of Virginia
SSA Marine
Terminal Investment Limited
TraPac Terminals
Yusen Terminals LLC

[19] 19 U.S.C. § 2417(a)(1).